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APPENDIX

Supreme Court, U. S.
FILED
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-1631

STANLEY T. KUSPER, JR., ET AL.,

Appellants,

vs.

HARRIET G. PONTIKES,

Appellee.

Appeal from the United States District Court, Northern District of Illinois

FILED JUNE 16, 1972
PROBABLE JURISDICTION NOTED APRIL 2, 1973

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CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

Sept. 28, 1971—Plaintiff's Complaint filed in the United States District Court for the Northern District of Illinois, Eastern Division.

Oct. 19, 1971—Defendants' original Answer filed.

Oct. 26, 1971—Plaintiff files Notice of Motion and Application for a Three Judge Panel.

Nov. 1, 1971—Plaintiff files Brief in Support of Application for a Three Judge Panel.

Nov. 11, 1971—Defendants file Brief in Opposition to Plaintiff's Application for Three Judge Panel.

Dec. 17, 1971—Court files its Memorandum Opinion and grants plaintiff's Motion for a Three Judge Court.

Jan. 20, 1972—Plaintiff files Motion for Summary Judgment and Brief in Support.

Feb. 10, 1972—Defendants file Amended Answer.

Feb. 10, 1972—Defendants file Answer to Motion for Summary Judgment and Suggestions.

Feb. 10, 1972—Oral Argument held.

Mar. 9, 1972—Opinion and judgment of the Three Judge District Court.

Mar. 13, 1972—Court issues Injunction Writ.

Mar. 17, 1972—Defendants file Notice of Appeal to United States Supreme Court.

COMPLAINT FOR DECLATORY (sic) AND INJUNCTIVE RELIEF

(Filed September 28, 1971)

To The Honorable Judges Of This Court:

Count One

1. The jurisdiction of this Court is invoked under Title 28, Section 1983, Title 42, Section 1971 (b) U.S.C.A. and the United States Constitution and more particularly, Article I, Article II, Amendment I, Amendment XIV, and Amendment XVI thereto.

2. The Plaintiff, Harriet G. Pontikes, is a citizen and qualified voter and elector residing in Ward 50, Precinct 36 of the City of Chicago, County of Cook, and State of Illinois.

3. The Defendants, Stanley Kusper, Francis P. Canary and Marie Suthers are the duly appointed commissioners of the Chicago Board of Election which has had and currently had jurisdiction over the elections held in the City of Chicago including the keeping of the voting lists past and present and including the certification of judges of elections to execute the election law.

4. The Election Code of the State of Illinois provides in relevant part:

> The following regulations shall be applicable to Primaries:
> No person shall be entitled to vote at a primary:
> (d) If he shall have voted after January 1, 1939 at a primary held under this Article 7 of another political party within a period of twenty-three calendar months next preceding the calendar month in

which such primary is held: Provided, participation by a primary elector in such primary is held (sic): Provided, participation by a primary elector in a primary of a political party which, under the provisions of Section 7-2 of this Article, is a political party within a city, village or incorporated town or town only and entitled hereunder to make incorporated town or town only (sic) and entitled hereunder to make nominations of candidates for city, village or incorporated town or town offices only, and for no other office or offices, shall not disqualify such primary elector from participating in other primaries of his party: And, provided, that no qualified voter shall be precluded from participating in the primary of any purely city, village or incorporated town or town political party under the provisions of Section 7-2 of this Article by reason of such voter having voted after January 1, 1939, at the primary of another political party within a period of twenty-three calendar months next preceding the calendar month in which he seeks to participate is held. Chapter 46, Section 7-43d. Ill. Rev. Stats. 1971.

5. The Plaintiff voted in the primary of the Republican Party in the primary election held on February 23, 1971.

6. There will be a primary election held throughout the State of Illinois including the City of Chicago on March 21, 1972, being less than 23 months from the last primary, wherein candidates for the offices of President of the United States, United States Senator and United States House of Representatives, among others will be chosen.

7. The Plaintiff wishes to vote in the primary of the Democratic Party in the aforesaid primary.

8. The Plaintiff will be denied her constitutional right to vote on March 21, 1972, by Chapter 46, Section 7-43d, Ill. Rev. Stats. (1971) infra.

Count Two

1-3. The Plaintiff realleges the allegations of paragraphs one through three of Count One of the Complaint and incorporates them by reference herein as if they were set forth in full hereunder.

4. The Election Code of the State of Illinois provides in relevant part as follows:

> The following regulations shall be applicable to primaries:
> No person shall be entitled to vote at a primary:
> (a) Unless he declares his party affiliations as required by this Article; Chapter 46, Section 7, 43a.

5. Concommitant with the rights to vote as guaranteed by the United States Constitution is the right to secrecy of the ballot.

6. There will be a primary election held in the City of Chicago on March 21, 1972, being less than twenty-three months from the last primary, where candidates for the offices of President of the United States, United States Senator and United States House of Representatives, among others, will be chosen.

7. Further, the voting rights Act of 1960 provides in relevant part as follows:

> (b) No person, whether acting under color of law or otherwise, shall intimidate, threaten, coerce, or attempt to intimidate, threaten, or coerce any other person for the purpose of interfering with the right of such other person to vote or to vote as he may chose, or of causing such other person to vote for,

or not to vote for, any candidate for the office of President, Vice-President, presidential elector, Member of the Senate, or Member of the House of Representatives, Delegates or Commissioners from the Territories or possessions, at any general, special or primary election held solely or in part for the purpose of selecting or electing any such candidate. Title 42, Section 1971 U.S.C.A. (1971).

8. The First Amendment of the United States Constitution guarantees the right to be free from an invasion of privacy; and the Fourteenth Amendment prohibits the state from violating said right.

9. The declaration of Plaintiff's party affiliation as required by Chapter 46, Section 7-43a (Ill. Rev. Stats. 1971) is intimidating to the Plaintiff and violates her constitutional right to vote, her right to cast a secret ballot as well as her Constitutional right to be free from invasion of privacy.

Wherefore, Plaintiff prays as follows:

1. That a three judge panel be invoked as provided in Title 28, Section 228 U.S.C.A.

2. That this Court or said three judge panel declare Chapter 46, Section 7-43d Ill. Rev. Stats. be declared void as violative of the Plaintiff's rights as guaranteed by the United States Constitution and Title 28, Section 1983 U.S.C.A. and Title 42, Section 1971b U.S.C.A.

3. That an injunction issue against the Defendants to prevent them from barring Plaintiff from voting in the primary of the Democratic party on March 21, 1972.

4. For an injunction against the Defendants and their agents, the Judges of Election, in Ward 50, Precinct 36 of the City of Chicago, Illinois, from asking and registering which primary the Plaintiff votes on March 21, 1972.

5. For such other relief as the Court deems just and equitable.

/s/ Ray Jeffrey Cohen
Attorney For Plaintiff

APPLICATION FOR THREE JUDGE PANEL

Now comes the Plaintiff, Harriet Pontikes, by and through her attorney, Ray Jeffrey Cohen, and states to this Honorable Court as follows:

1. The complaint filed herein seeks a permanent injunction against the enforcement of certain statutes of the State of Illinois, to wit:

Chap. 46, Sec. 7-43d, and Chap. 46, Sec. 7-43a (Ill. Rev. Stats. 1970);

2. The reasons cited for said injunction are that said statute is unconstitutional, as being in violation of Plaintiff's rights secured by Article I, Article II, Amendment I, Amendment XIV, Amendment XVI of the United States Constitution.

3. Time is of the essence.

Wherefore, Plaintiff prays for the appointment for a Three Judge Panel pursuant to the provisions of Title 28, Sec. 2281 and Title 28, Sec. 2284 (U.S.C.) and that the Clerk of the United States District Court for the Northern District of Illinois be directed to mail the

proper Statutory notices to the Governor of Illinois and the Attorney General of Illinois of any hearings.

/s/ Ray Jeffrey Cohen
Attorney for Plaintiff

BRIEF IN SUPPORT OF APPLICATION FOR THREE JUDGE PANEL

(Filed November 3, 1971)

The Plaintiff seeks a three judge panel to rule on this case since the complaint alleges that certain statutes of the State of Illinois violate the United States Constitution and the rights guaranteed to the Plaintiff thereunder. Count One of the complaint alleges that Chapter 46, Secion 7-43d of the Illinois Revised Statutes which prohibits a voter from changing party allegiance within 23 months is unconstitutional.

Count two alleges that Chapter 46, Section 7-43a which forces an individual to vocally declare his party affiliation as a prerequisite for voting is unconstitutional.

An injunction restraining the enforcement of said statute is sought by the Plaintiff. Title 28, Section 2281 of the United States Code provides as follows:

> An interlocutory or permanent injunction restraining the enforcement, operation or execution of any State statute by restraining the action of any officer of such State in the enforcement or execution of such statute or of an Order made by an administrative board or commission acting under State statutes, shall not be granted by a district court or judge thereof upon the ground of the unconstitutionality of such statute unless the application therefor is heard and determined by a district court of three judges under Sec-

tion 2284 of this title. June 25, 1948, C. 646, 62 Stat. 968.

The use of a three judge panel in election cases is altogether appropriate and has often been done. Most recently this procedure was invoked in this district where a determination of the constitutionality of the Illinois statutory provisions relating to the election of judges was sought. *Romiti* v. *Kerner*, D.C. Ill. 1966, 256 F. Supp. 35.

A suit brought in Mississippi challenging a state law requiring the registration of the names of political parties with the Secretary of State of Mississippi was required to be heard by the three judge court. *Howard* v. *Ladner*, D.C. Miss. 1953, 116 F. Supp. 783. Three judge panels were also required in cases taking state election laws brought by political candidates in *Stokes* v. *Fortson*, D.C. of Ga. 1964, 234 F. Supp. 575; *Votaggio* v. *Caputo*, D.C. of N.J. 1962, 210 F. Supp. 337.

The three judge panel has long been used to consider the constitutionality of reapportionment statutes. *Drew* v. *Scranton*, D.C. Pa. 1964, 229 F. Supp. 310, vacated on other grounds and remanded 85 S. Ct. 207, 379 U.S. 40, 13 L. Ed. 2d 107; *Lisco* v. *Love*, D.C. Colo. 1963, 219 F. Supp. 922, reversed on other grounds 84 S. Ct. 1459, 377 U.S. 713, 12 L. Ed. 2d 632; *Baker* v. *Carr*, D.C. Tenn. 1959, 175 F. Supp. 649.

The question involved herein is a substantial one since it affects all those who vote in party primary in the Democratic or Republican primary in February 1971. On information and belief, Plaintiff states that this amounts to more than 300,000 persons.

Most recently Judge Bernard Decker of this district was called upon to convene a three judge panel to determine the constitutionality of certain other sections of the Illinois election code in the case of *Caryl Bendinger et al* v. *Richard Ogilvie, et al,* Case No. 71 C 2037. In that case an individual was challenging the election statutes as so far as that prohibited his candidacy for the Illinois Legislation because of prior party affiliations. A three judge court was convened in that matter and it is now hearing said case.

The overwhelming weight of authority in this district and the county favor the impaneling of a three judge court herein.

Respectfully submitted,
/s/ Ray Jeffrey Cohen

BRIEF IN OPPOSITION TO THE PLAINTIFF'S APPLICATION FOR A THREE JUDGE PANEL

(Received November 10, 1971)

The Defendants, Stanley Kusper, Francis P. Canary, and Marie H. Suthers as the Chicago Board Of Election Commissioners, respectfully submit that this Honorable Court lacks the jurisdiction to invoke a Three Judge Panel to determine the Constitutionality of the State Statute alleged in the Plaintiff's Petition. In the Plaintiff's Petition for Declaratory and Injunctive Relief, she cites as the basis of this Court's jurisdiction, Title 28, Section 1983, Title 42, Section 1971(b) and the United States Constitution. An examination of these sections of the United States Code reveals that there is no Title 28, Section 1983, therefore, in that regard there is no basis

for this Court's jurisdiction. As regards Title 42, Section 1971(b), the Plaintiff has cited no actions specifically or otherwise in which any "person" has attempted to intimidate, coerce or threaten the Plaintiff if she elected to or attempt to exercise her elective franchise as required by that section. The jurisdiction of the United States District Court must be affirmatively alleged and shown in all cases relating to the issuance of injunctive relief and restraining the enforcement of a State Statute, *Nichols* v. *McGee*, 1959, 80 S. Ct. 90. The Plaintiff has failed to meet this requirement.

Assuming arguendo, although it is specifically denied, that this Court does have jurisdiction to impanel a Three Judge Court to hear this matter, its decision should be deferred pending the determination by the Three Judge Court, to which the Plaintiff made reference in her Brief in the case of *Caryl Bendinger et al* v. *Richard Ogilvie, et al*, Case No. 71 C 2037. That case involves the issue of the Constitutionality of the 23 month prohibitory period relating to changing of ones party affiliation, although in that case the Plaintiff was a Candidate for the Illinois Legislature and in the instant matter the Plaintiff desires to cast her ballot in the Primary Election. The main issue is whether or not the 23 month prohibitory period is constitutional.

For these reasons the Defendants request that the Plaintiff's Petition for Declaratory and Injunctive Relief be denied and that her complaint be dismissed.

Respectfully submitted,
/s/ Howard M. Miller
Attorney for Defendants

MEMORANDUM OPINION

Motion for Three-Judge Court

(Filed December 17, 1971)

Plaintiff is a citizen of the United States and a qualified voter and elector. Defendants are the duly appointed commissioners of the Chicago Board of Elections which has jurisdiction over elections and election procedure in the City of Chicago.

Plaintiff is challenging the so called "23-month rule" in regard to primary elections whereby a voter cannot cast a ballot in the primary of a particular party if he or she has cast a vote at the primary of another political party within a twenty-three month period preceding the current election.

The Election Code of the State of Illinois provides:

> The following regulations shall be applicable to Primaries:
> No person shall be entitled to vote at a primary:
> (d) If he shall have voted after January 1, 1939 at a primary held under this Article 7 of another political party within a period of twenty-three calendar months next preceding the calendar month in which such primary is held: Provided, participation by a primary elector in such primary is held (sic): Provided, participation by a primary elector in a primary of a political party which, under the provisions of Section 7-2 of this Article, is a political party within a city, village or incorporated town or town only and entitled hereunder to make incorporated town or town only (sic) and entitled hereunder to make nominations of candidates for city, village or

> incorporated town or town offices only, and for no other office or offices, shall not disqualify such primary elector from participating in other primaries of his party: And, provided, that no qualified voter shall be precluded from participating in the primary of any purely city, village or incorporated town or town political party under the provisions of Section 7-2 of this Article by reason of such voter having voted after January 1, 1939, at the primary of another political party within a period of twenty-three calendar months next preceding the calendar month in which he seeks to participate is held. Chapter 46, Section 7-43d. Ill. Rev. Stats. 1971.

Plaintiff claims that this provision prevents her from voting in the Democratic primary to take place on March 21, 1972, in violation of her constitutional rights, because she voted in the Republican Party primary held on February 23, 1971, which is within the 23-month prohibitory period of the statute.

Plaintiff further claims that her constitutional right to a secret ballot is violated by the statutory requirement of a declaration of party affiliation before one can vote in a party primary. The Election Code of the State of Illinois provides that:

> The following regulations shall be applicable to primaries:
> No person shall be entitled to vote at a primary:
> (a) Unless he declares his party affiliations as required by this Article; Chapter 46, §7, 43a.

Plaintiff contends that this provision infringes on her secret ballot rights, her right to privacy under the First Amendment, her right to vote and is furthermore in violation of 42 U.S.C. §1971, the Voting Rights Act of 1960. The Act provides that:

(b) No person, whether acting under color of law, or otherwise, shall intimidate, threaten, coerce or attempt to intimidate, threaten, or coerce, any other person for the purpose of interfering with the right of such other person to vote or to vote as he may chose, or of causing such other person to vote for, or not to vote for, any candidate for the office of President, Vice-President, presidential elector, Member of the Senate, or Member of the House of Representatives, Delegates or Commissioners from the Territories or possessions, at any general, special or primary election held solely or in part for the purpose of selecting or electing any such candidate. Title 42, Section 1971 U.S.C.A. (1971).

Plaintiff argues that the declaration of party affiliation is an intimidation in violation of the Voting Rights Act. Plaintiff seeks a declaration voiding the pertinent voting statutes and an injunction against Defendants preventing them from barring her from voting in the Democratic Party primary on March 21, 1972. The case is presently before this Court on an application for a Three Judge Panel brought on Plaintiff's behalf.

Title 28 U.S.C. § 2281 provides that a three judge court must be convened where the constitutionality of a state regulation or statute is being challenged; the statute is of general application throughout the state; injunctive relief is sought; and a substantial federal question is raised. See *Ex Parte Poresky,* 290 U.S. 30 (1933); *Idlewild Bon Voyage Liquor Corp.* v. *Epstein,* 370 U.S. 713 (1962).

There is no doubt as to the presence of the first three ingredients and it is the last ingredient, the existence of a substantial federal question that must be decided.

The test for determining whether a constitutional claim is so insubstantial as not to require a three-judge court is whether "the question is obviously without merit or . . . its unsoundness results from previous decisions of this Court as to foreclose the subject and leave no reason for the inference that the question raised can be the subject of controversy." *Ex Parte Poresky,* 297 U.S. 30, 32 (1933).

Based on this test and the relevant case law we do not find Plaintiff's contentions so insubstantial as to deny her motion for a three judge court.

The case most analogous to ours was decided just one month ago in this District. In *Caryl Bendinger, et al.* v. *Richard Ogilvie, et al.*, 71 C 2037, the plaintiffs challenged the Illinois statutory requirement that in order to be eligible candidate in a political party primary, a person cannot have "requested a primary ballot of another party at a primary election held within 2 years of the date on which the petition [for nomination] must be filed." Ill. Rev. Stat., Ch. 46, §8-8. The three-judge court discussed the compelling state interest that must be present to justify voting regulation (See *Williams* v. *Rhodes,* 393 U.S. 23 (1968); *NAACP* v. *Button,* 371 U.S. 415 (1963); *Jackson* v. *Ogilvie,* 325 F. Supp. 864 (N.D. Ill.)) and decided that the Illinois Legislature had several compelling reasons for passing the so called "24-month rule". Some of these reasons were: To prevent party subversion by putting up sham candidates; to preserve party loyalty; to limit the elective process to manageable and realistic proportions by preventing the resulting confusion from an overabundance of candidates; and to preserve party politics.

The Defendants in our case argue that these very same compelling reasons are present in the voter situation and the *Bendinger* case therefore forecloses any substantial constitutional issue and consequently a three-judge court should not be convened.

We disagree. The *Bendinger* case made it abundantly clear that it was referring only to the statute regarding *candidates* and not to voter restrictions. The Court said:

"Plaintiffs rely on *Gordon* v. *Executive Committee of the Democratic Party of the City of Charleston,* 71-852 (D.S.C. September 28, 1971), in support of their argument that the '24 month rule' is unconstitutional. However, *Gordon* dealt with the restriction upon party switching placed on voters in primary elections. The instant case involves the restriction placed upon candidates in primary elections. The state's interest in limiting candidates from switching parties, as detailed above, is greater than its interest in limiting voters from switching parties. The state's interest in preserving a vigorous and competitive two-party system is fostered by the requirement that candidates demonstrate a certain loyalty and attachment to the party in whose primary they are running; the same cannot be said of voters, however, who should be freer to demonstrate their changes in political attitude by voting for popular candidates or against unpopular candidates in any party's primary election. Thus, it is not inconsistent to prevent candidates from switching parties from election to election and at the same time to permit voters to do so."

There being a substantial constitutional issue involved in this case not in any manner foreclosed by prior law we grant the Plaintiff's motion for a three judge court.

Enter: /s/ Abraham L. Marovitz
Judge

Date: Friday, December 17, 1971

MOTION

Now comes the Plaintiff, Harriet Pontikes, by and through her attorney, Ray Jeffrey Cohen, and pursuant to Rule 56 of the Federal Rules of Civil Procedure, moves for Summary Judgment on Count One and Count Two of the Complaint and further for the entry of a permanent injunction as prayed for in the complaint.

/s/ Ray Jeffrey Cohen
Attorney for Plaintiff

BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

This is a suit to enjoin the enforcement of a certain statute of the State of Illinois which prohibits a voter who voted in a party primary from voting in a party primary of another party within twenty-three months. The statute provides:

> The following regulations shall be applicable to Primaries:
> No person shall be entitled to vote at a primary:
> (d) If he shall have voted after January 1, 1939 at a primary held under this Article 7 of another political party within a period of twenty-three calendar months next preceding the calendar month in which such primary is held: Provided, participation by a primary elector in such primary is held (sic):

> Provided, participation by a primary elector in a primary of a political party which, under the provisions of Section 7-2 of this Article, is a political party within a city, village or incorporated town or town only and entitled hereunder to make incorporated town or town only (sic) and entitled hereunder to make nominations of candidates for city, village or incorporated town or town offices only, and for no other office or offices, shall not disqualify such primary elector from participating in other primaries of his party: And, provided, that no qualified voter shall be precluded from participating in the primary of any purely city, village or incorporated town or town political party under the provisions of Section 7-2 of this Article by reason of such voter having voted after January 1, 1939, at the primary of another political party within a period of twenty-three calendar months next preceding the calendar month in which he seeks to participate is held. Chapter 46, Section 7-43d. Ill. Rev. Stats. 1971.

Count One alleges that the Plaintiff is a qualified voter who cast a ballot in the primary of the Republican Party on February 23, 1971, and who now seeks to vote in the Democratic Primary to be held on March 21, 1972, being within twenty-three months of one another. It is alleged that this Statute effectively bars plaintiff from voting on March 21, 1972, and thus violates her constitutional right to the ballot.

There is no dispute as to the facts in this case.

The United States Supreme Court has held that the right to vote is a fundamental one in our country. *Reynolds* v. *Sims*, 377 U.S. 533, 561 (1964). Courts have also held that Federally protected constitutional rights will be protected in primaries as well as in general elections. *Brown* v. *Baskin*, 73 F. Supp. 933 (1948 D.C.).

Many states including Illinois have residency requirements which limit the franchise to those voters who have resided in the State, County and/or Precinct for a certain length of time. The Courts have upheld these but only where there was a "sound or compelling reason" to abridge the individuals right to vote. *Lassiter* v. *North Hampton County Board of Elections,* 360 U.S. 451, 3 L. Ed. 2d 1072, 79 S. Ct. 985 (1959).

States have set up residency requirements as a precondition to certain rights within that state in other areas such as public aid and divorce. These statutes have been attacked as violative of equal protection and the Courts have more recently become pre-disposed to protect the individual's right to equal protection as opposed to the State's right to grant rights to only bona fide residents. Recently, a three judge panel in this Circuit struck down the Wisconsin divorce law residency requirement and held that the individual's rights were superior to the state interests which were argued in support of the two year waiting period before filing a divorce. *Wymelenberg* v. *Syman,* 328 F. Supp. 1353, Eastern District of Wisconsin, June 30, 1971.

There is no question that the Plaintiff will be prohibited from voting by the statute for those candidates, being individuals seeking nomination in the Democratic party, whom she desires to on March 21, 1972, because of her past actions. The Plaintiff's right to vote is far more substantial than whatever state or party interests might be served prohibiting party switching within a twenty-three month period.

Recently, a three judge panel in this Circuit in the case of *Bendinger* v. *Ogilvie,* 71 C 2037, challenged the

statutory requirement that a candidate for office cannot have voted in the party primary of another political party within twenty-three months from the date on which his nominating petitions must be filed. In upholding the statute the Court said that the interest in sustaining the two party system overrode the right of the Plaintiff to become a candidate of an opposite political party. However, the Court stated that "The state's interest in preserving a vigorous and competitive two-party system is fostered by the requirement that candidates demonstrate a certain loyalty and attachment to the party in whose primary they are running; the same cannot be said of voters, however, who should be freer to demonstrate their changes in political attitude by voting for popular candidates or against unpopular candidates in any party's primary election. Thus, it is not inconsistent to prevent candidates from switching parties from election to election and at the same time to permit voters to do so".

Recently a case nearly identical to the instant one was decided by a three judge panel in South Carolina. In the case of *Gordon* v. *Executive Committee of the Democratic Party of the City of Charleston.* The South Carolina statute stated

> "I do solemnly swear or affirm that I am duly qualified to vote at this primary election and in this club, and that I have not voted before at this primary election or in any other party's primary election, convention, or precinct meeting held this year." Section 23-400.71, Code of Laws of South Carolina, 1962.

A Republican Primary was held on February 20, 1971. Following that, a primary election was held in the Demo-

cratic party on June 8, 1971, for the Federal Housing of representatives. Certain voters sought to vote in that election even though they had voted in the primary in February. The Democratic Party of Charleston permitted the Plaintiffs and others to vote in the June 8 primary in derogation of the statute prohibiting and voting. The Court ruled that the action of the Defendants had been proper since the statute was clearly unconstitutional. The Court stated "We can perceive no basic difference between a durational residence restriction and one which, using a like durational standard, bases the restriction upon the manner in which one had previously voted. No sound or compelling purpose can possibly justify 'locking' a citizen into a party and denying to him for a full year freedom to change parties. Such an arbitrary restraint upon the voter is both unreasonable and unconstitutional. Our system of government is based on the consent of the governed, and such consent is only illusory when voters are prevented by artificial restrictions for significant periods of time from changing political parties even though events or the actions of elected representatives may have convinced the voter that a change in party allegiance is warranted".

There can be absolutely no distinction between a one calendar year rule as found in South Carolina and a twenty-three month rule in Illinois. If anything, the interpretation given the South Carolina statute that prohibits party switching of a period less than 120 days stands as clear precedent to strike down the Illinois statute and any others which diminish or eliminate one's right to vote. If a state has no right to limit a switch in four months time, how can it have the right to limit a switch in twenty-three months?

Wherefore, Plaintiff alleges that an injunction issue permanently enjoining the enforcement of said Chapter 46, Section 7-43d. Ill. Rev. Stats. 1971.

Count Two

In Count Two the Plaintiff seeks to enjoin the enforcement of a certain Illinois Statute which requires that voters openly declare their party affiliation as a prerequisite to voting in the primary. The Statute provides:

> The following regulations shall be applicable to primaries:
> No person shall be entitled to vote at a primary:
> (a) Unless he declares his party affiliation as required by this Article; Chapter 46, Section 7, 43a.

There is no dispute as to the facts.

It is alleged that this statute is a violation of the Plaintiff's right to privacy and the right to freedom of association. The constitutional right of privacy and its protection against state invasion is protected by the first and ninth Amendments to the Constitution. *Griswold* v. *Connecticut*, 1965, 381 U.S. 479, 14 L. Ed. 2d 510, 355 S. Ct. 1678. It is an important corrolary to the right to vote that the ballot be kept a secret. The secret ballot is an integral part of the Anglo-American voting tradition which has been preserved to this day. In voting booths the voter is shielded from others by a curtain; No one is allowed to infringe on this privacy; No names are placed on the ballots for signature by the voter—why then the anomalous situation that a voter must devulge allowed his party preference. Since in no primary in recent memory has there been a contest for every single office. This devulging of information clearly indicates for whom a voter is to cast his ballot. It is the prac-

tice of the Defendants to record this party preference in the "binder" and preserve a permanent record of a person's affiliation. Although this information is allegedly kept confidential between Defendants, no state or governmental body has the right to this information.

In recent years question of freedom of association has arisen with respect to allegedly subversive or un-American groups and their membership lists in attempting to balance the right of the individual to secret the names of those he associates with as against the state interests in knowing the activities of groups. The Courts have looked at the groups to determine whether there was a "substantial relationship between the information found and compelling state interest". *Gibson* v. *Florida Legislative Investigative Committee,* 1963, 372 U.S. 539, 9 L. Ed. 2d 929, 935, 83 S. Ct. 889. It is thus been held that the State of Florida could not compel the NAACP to produce its membership lists.

There is no substantial state interest in knowing the party preference of an individual voter. Therefore, the constitutionally protected right to remain free from invasion or privacy and to be allowed freedom of association clearly is controlling in the Illinois statute aforementioned violates Plaintiff's constitutional rights. The forfeiture of these rights cannot constitutionally serve as a prerequisite to voting to one otherwise qualified to cast a vote.

Wherefore, Plaintiff prays for the entry of a permanent injunction in joining the enforcement of Chapter 46, Section 7-43d. Ill. Rev. Stats. 1971.

AMENDED ANSWER

Now come defendants by their attorneys, Howard M. Miller, Aldus S. Mitchell and Sophia H. Hall answering the Complaint for Declaratory and Injunctive Relief and say:

Count I

(1) Defendants deny that this court has jurisdiction under Title 28 USC § 1983 as alleged or Title 42 USC § 1983 as more particularly set out hereafter. Defendants deny that this court has jurisdiction under Title 42 USC § 1971 (b) or any other sub-section of 42 USC § 1971.

Defendants further say that no private citizen is given the right under Title 42 USC § 1971 to bring any action under that section in United States District Court; this court has no original jurisdiction under Title 42 U.S.C. 1983 of Title 42 U.S.C. 1971 to protect rights alleged under the Articles and Amendments to the United States Constitution as set out in paragraph 1 of Count 1 of plaintiff's complaint.

(2) Defendants admit the allegations of paragraph 2 of plaintiff's complaint.

(3) Defendants admit the allegations of paragraph 3 of plaintiff's complaint.

(4) Defendants deny that the portion of the Illinois Election Code set out in paragraph 4 of plaintiff's complaint is all of the relevant portion of the Illinois Election Code concerning primary voting.

Defendants respectfully call the court's attention to Ill. Rev. Stats. Chapter 46 § 7-43 and § 7-44 as being

relevant to the right to vote in a primary held under the Illinois Election Code to-wit:

§ 7-43 *Qualifications of Voters at primary elections* Every person having resided in this State 6 months and in the precinct 30 days next preceding any primary therein who shall be a citizen of the United States above the age of 21 years shall be entitled to vote at such primary.

The following regulations shall be applicable to primaries:

No person shall be entitled to vote at a primary:

(a) Unless he declares his party affiliations as required by this Article;

(b) Who shall have signed the petition for nomination of a candidate of any party with which he does not affiliate, when such candidate is to be voted for at the primary;

(c) Who shall have signed the nominating papers of an independent candidate for any office for which office candidates for nomination are to be voted for at such primary; or

(d) If he has voted at a primary held under this Article 7 of another political party within a period of 23 calendar months next preceding the calendar month in which such primary is held: Provided, participation by a primary elector in a primary of a political party which, under the provisions of Section 7-2 of this Article, is a political party within a city, village or incorporated town or town only and entitled hereunder to make nominations of candidates for city, village or incorporated town or town offices only, and for other officer or offices, shall not disqualify such primary elector from participating in other primaries of his party: And provided that no qualified voter shall be precluded from participating in the primary of any purely city, village or incorporated town or town political

party under the provisions of Section 7-2 of this Article by reason of such voter having voted at the primary of another political party within a period of 23 calendar months next preceding the calendar month in which he seeks to participate is held.

(e) In cities, villages and incorporated towns having a board of election commissioners only voters registered as provided by Article 6 of this Act shall be entitled to vote at such primary.

(f) No person shall be entitled to vote at a primary unless he is registered under the provisions of Articles 4, 5 or 6 of this Act when his registration is required by any of said Articles to entitle him to vote at the election with reference to which the primary is held.

§ 7-44 *Announcement of voter's name, etc.—initialing primary ballot—Challenges* Any person desiring to vote at a primary shall state his name residence and party affiliation to the primary judges one of whom shall thereupon announce the same is a distinct tone of voice, sufficiently loud to be heard by all persons in the polling place. When Article 4, 5 of 6 is applicable the Certificate of Registered Voter therein prescribed shall be made and signed and the official poll record shall be made. If the person desiring to vote is not challenged, one of the primary judges shall give to him one, and only one primary ballot of the political party with which he declares himself affiliated, on the back of which such primary judge shall endorse his initials in such manner that they may be seen when the primary ballot is properly folded. If the person desiring to vote is challenged he shall not receive a primary ballot from the primary judges until he shall have established his right to vote as hereinafter provided. No person who refuses to state his party affiliation shall be allowed to vote at a primary.

(5) Defendants admit the allegations of paragraph 5 of plaintiff's complaint.

(6) Defendants deny that a candidate for office of President of the United States will be chosen at the primary election in the State of Illinois to be held on March 21, 1972. Defendants admit all other allegations of paragraph 6 of plaintiff's complaint.

Defendants further say that the defendant's jurisdiction in administering Election laws of the State of Illinois extend only to the City of Chicago and Villages of Berwyn, Cicero, Stickney and Lyons. That the primary election is governed by the Election Code of the State of Illinois pursuant to Article 1, Section 4 of the Constitution of the United States and the Tenth Amendment to the Constitution of the United States.

(7) Plaintiff has no right to vote in the primary of the Democratic Party having voted in the primary of the Republican Party in 1971, less than 23 months prior to the primary of the Democratic Party to be held on March 21, 1972.

(8) Defendants deny each and every allegation of paragraph 8 of plaintiff's complaint.

Defendants further say the right to vote in Elections is regulated by the laws of the State of Illinois except where Congress shall have by laws altered the State regulations as to choosing Senators and Representatives pursuant to Article 1, Section 4 of the Constitution of the United States. Congress has passed no law preventing the State of Illinois from determining the qualifications of persons to vote in a political party primary.

Count II

Defendants repeat and reallege the allegations of paragraphs 1 through 8 of Count I of their Answer as paragraphs 1 through 8 of the Answer to Count II of plaintiff's complaint as if fully set herein in haec verba.

(9) The Constitution of the United States and the Constitution of the State of Illinois do not protect the right to vote in party primaries in the State of Illinois. The right to participate in primaries of political parties is limited to members and affiliates of the particular political party involved. The right to secrecy of ballot does not relate to the determination of the primary in which one wishes to participate but to protecting voters in casting a vote for a person of their choice as the nominee of the political party in whose primary that voter participates.

(10) Defendants deny that a candidate for the office of President of the United States will be chosen 1 March 21, 1972. Defendants admit the other allegations of paragraph 6 of Count II of plaintiff's complaint.

(11) Defendants admit that paragraph 7 of Count II of plaintiff's complaint sets out a portion of Title 42 U.S.C. § 1971. Defendants respectfully call the court's attention to Title 42 U.S.C. § 1971 (c), to-wit:

> (c) Whenever any person has engaged or there are reasonable grounds to believe that any person is about to engage in any act or practice which would deprive any other person of any right or privilege secured by subsection (a) or (b) of this section the Attorney General may institute for the United States, or in the name of the United States, a civil action or other proper proceedings for preventive relief, including an application for a per-

manent or temporary injunction, restraining order, or other order. If in any such proceeding literacy is a relevant fact there shall be a rebuttable presumption that any person who has not been adjudged an incompetent and who has completed the sixth grade in a public school in, or a private school accredited by, any State or territory, the District of Columbia, or the Commonwealth or Puerto Rico where instruction is carried on predominantly in the English language, possesses sufficient literacy, comprehension, and intelligence to vote in any election. In any proceeding hereunder the United States shall be liable for costs the same as a private person. Whenever in a proceeding instituted under this subsection any official of a State or sub-division thereof is alleged to have committed any act or practice constituting a deprivation of any right or privilege secured by subsection (a) of this section the act or practice shall also be deemed that the State and the State may be joined as a party defendant and, if, prior to the institution of such proceeding, such official has resigned or has been relieved of his office and no successor has assumed such office, the proceeding may be instituted against the State.

The Attorney General of the United States has brought no action against any officer of or the State of Illinois pursuant to 42 U.S.C. 1971.

(12) Neither the defendants nor the Illinois Election Code interfere with any right of the plaintiff to be free from invasion of privacy. Plaintiff has no right to participate in a political party primary in the State of Illinois except that the plaintiff complies with laws of the State of Illinois.

(13) Defendants deny each and every allegation of paragraph 9 of Count II of plaintiff's complaint.

Wherefore defendants pray that:

Judgment be entered for the defendants.

That plaintiff's prayer for three (3) judge court pursuant to 28 U.S.C. § 2281 be denied for want of a substantial Federal question.

For such other relief as is necessary in the premises.

/s/ Howard M. Miller
/s/ Sophia H. Hall
/s/ Aldus S. Mitchell
Attorneys for defendant

State Of Illinois
County Of Cook—ss.

Stanley T. Kusper, Jr., being first duly sworn deposes and says that he is the Chairman of the Chicago Board of Election Commissioners and has knowledge of the facts stated herein; that he has read the Amended Answer to plaintiff's complaint and matters stated therein are true.

.....

Subscribed and Sworn to before me.
this ..... day of ....., 1972

.....
Notary Public

ANSWER TO MOTION FOR SUMMARY JUDGMENT AND SUGGESTIONS.

Plaintiff's Motion for Summary Judgment is insufficient under Rule 56 Federal Rules of Civil Procedure. The essential allegations contained in plaintiff's complaint are not admitted by the defendants and there are no supporting affidavits, depositions, answers to in-

terrogatories or admissions on file in this cause. It is well settled that on motions for summary judgment, the court must view the record in the light most favorable to the party opposing the motion for summary judgment. *Crest Auto Supplies, Inc.* v. *Ero Manufacturing Co.*, 360 F. 2nd 896 (C.A. 7, 1966).

Plaintiff's complaint does not set out a basis for this Court's jurisdiction. Despite the plain language of Rule 8 (a) FRCP, the complaint in this cause does not state a sufficient basis for this Court taking jurisdiction in this cause. The Federal District Courts are Courts of limited jurisdiction, having only the jurisdiction conferred by Statute. See 28 U.S.C. § 1331 through § 1362. For the most part that jurisdiction is not exclusive of the state court's jurisdiction. The defendants and this court the entitled to be advised by the plaintiff of the statutory authority on which plaintiff relies in seeking a remedy in the Federal District Court. See *Gully* v. *First National Bank in Meridian*, 299 U.S. 109, 57 S. Ct. 96 (1936); *Pan American Petro Co.* v. *Superior Court of Delaware*, 366 U.S. 656, 81 S. Ct. 1303 (1961). The complaint which sets forth no statute relied upon as conferring jurisdiction is fatally defective. *Ivey* v. *Frost*, 346 F. 2d 115 (1965), *Voracheck* v. *United States*, 337 F. 2d 797 (1964), and the cause should be dismissed for want of jurisdiction. *McNutt* v. *McHenry Chevrolet Co.*, 298 U.S. 190, 56 S. Ct. 785 (1936).

Assuming arguendo that there is no genuine issue as to any material fact and that this Court does have jurisdiction, plaintiff's complaint does not state a claim on which relief should be granted.

In *United States* v. *Arizona*, 400 U.S. 112, 91 S. Ct. 260 (1970) the United States Supreme Court spelled out the relationship between the States and the Federal Government regarding elections. From that case, it is clear that the States have the right to determine the qualifications of their voters except where Constitutional Amendments, Amendments Fourteen, Fifteen, Seventeen, Nineteen and Twenty-Four or congressional enactments pursuant to Article I, Section 4 have limited that right. Plaintiff has not called to the attention of the Court any statute or case limiting the right of the State to determine the qualifications of its voters. Defendants have found no such enactment or case.

Defendants have no desire to challenge the broad general principles set out in plaintiff's brief in support of the Motion for summary judgment. Defendants however feel that it is their duty to point out to the court that *Reynolds* v. *Sims*, 377 U.S. 533 (1968) and *Brown* v. *Baskin*, 78 F. Supp. 933 (1964) are inappropriately cited as authority. The *Reynolds* case involved legislative reapportionment and the *Brown* case involved racial discrimination. It is well settled that racial discrimination can play no part in determining who can vote in elections in the United States. It is equally well settled that discrimination because of geographical location in a State will not be tolerated so as to unduly dilute a vote cast. In the case at bar, however, plaintiff makes no claim of discrimination or denial of equal protection of the laws. Plaintiff makes no claim that she is treated differently from any other citizen resident in the State of Illinois. Plaintiff claims and defendants admit that plaintiff

voted in the Republican Party primary on February 23, 1971. Plaintiff has the right to vote in the Republican Primary on March 21, 1972, or she may forego that right on March 21, 1972 if she no longer wishes to participate in the Republican Party. Her wishes are not germane to the questions before this Court. We respectfully suggest that the question open to determination is whether Chapter 46 § 7-43 (d) Ill. Rev. Stat. (1971) violates some portion of the Federal Constitution or violates a statute enacted by the Congress of the United States protecting the right to vote in a political party primary. Plaintiff does not so allege or offer authority to warrant this Court so finding. In *Lippitt* v. *Cipollone*, ... U.S. ....., ... S. Ct. ..... (1972) (Slip opinion attached as Exhibit A) the United States Supreme Court considering a decision of the United States District Court for the Northern District of Ohio affirmed the decision. It is clear from the dissent of Mr. Justice Douglas that the court was considering a statutory election plan not unlike the Illinois election plan. The Illinois election plan permits participation in a Political party primary if the voter has not participated in another party's primary within 23 months of the primary election to be held, instead of four (4) years as in Ohio. The Supreme Court refused to overturn the trial court decision. We respectfully submit that the action of this court should be controlled by the decision of the Supreme Court affirming the District Court in the *Lippitt* case, supra.

The Illinois legislature, in its wisdom, has adopted a plan of elections which protects political parties without regard to political philosophy. The Illinois Election

Code even provides an easy means for persons of like political persuasion to "Associate", to seek political office and to form a new political party. Chapter 46 § 10-2 Ill. Rev. Stat. (1971). Considering the contest in Cook County for the nomination of the Democratic Party for the office of State's Attorney and the fact that there is no contest for that office in the Republican Party, it does not stretch the imagination to understand the "wish" of a Republican Party participant to take part in the Democratic Party Primary. Without restrictions on changing parties the associates of the Republican Party can influence the choice of the Democratic Party for the benefit of the Republican Party nominee. The decision of this Court in *Bendinger* v. *Ogilvie,* ..... F. Supp. ..... (1971) and the rationale of that decision concerning candidates and the "24 month rule" is equally applicable in the case at bar. The protection of Political Parties in regard to candidates is of no value if that protection is eroded by party switching of voters. That switching can prevent a political party from having a candidate in the general election who truly supports the principles of the party he allegedly represents.

The State has a legitimate interest in protecting the multi-party system. It has enacted an Election Code which freely permits association of persons of the same political bent. The State has determined the conditions under which persons may participate in elections in this State. It has done so without violating any right granted or protected by the Federal Constitution, and the plaintiff has neither pleaded nor shown the contrary.

Count II

42 USC 1971 empowers the Attorney General of the United States to bring an action to secure a remedy under enumerated circumstances and the District Courts are granted jurisdiction to hear and determine the action brought. This section of Title 42 is grounded in the XV Amendment to the Constitution of the United States, *U. S.* v. *Mississippi*, 380 U.S. 128, 85 S. Ct. 808 (1965) and its purpose is to prevent racial discrimination. The United States is an aggrieved party when voters or potential voters are discriminated against in violation of the right to vote granted by the XV Amendment. *U. S.* v. *Mayton*, 335 F. 2d 153 (C.A. Ala. 1964). There is no claim in the case at bar of a violation of Amendment XV to the Constitution of the United States.

Chapter 46 § 7-43(a) Ill. Rev. Stats. should be read in conjunction with Chapter 46 § 7-5 Ill. Rev. Stats. Both sections of the Illinois Election Code should be considered in light of the comments of the defendants regarding Count I of plaintiff's Complaint which is incorporated herein in haec verba by reference. The State of Illinois, as approved by the Supreme Court of the United States in *U. S.* v. *Arizona*, Supra in ordering elections in the State has required that all political parties hold their primary elections for nomination of the party on the same day. Chapter 46 § 10-2 Ill. Rev. Stats. should not be emasculated to satisfy the whim of the plaintiff in the case at bar. Without the requirements of Chapter 46 § 7-43 a and Chapter 46 § 7-44, how can one determine the political party primary in which a voter wishes to participate? The secrecy of the ballot, of which plaintiff makes a central theme in Count II of her Complaint,

prevents the election officials from knowing how the voter has cast the ballot. In uncontested elections, since no provision is made for a negative vote generally, no harm is done if nobody votes in that election. There is no requirement in any of the United States that any person vote in any election. The interest of the State of Illinois is in protecting the multi-political party system to accommodate the integrity of all political parties and membership therein, *Lippitt* v. *Cipollone,* supra, and to accommodate the right of association, programs of political action, promotion of political ideas and the right to vote *Williams* v. *Rhodes,* 393 U.S. 23, 89 S. Ct. 5 (1968). The Illinois Election Code taken as a whole carries out the ideals and interest of the State of Illinois and of the United States.

It appears from reading plaintiff's complaint that plaintiff relies on Section 2281 and 2284 of Title 28 U.S.C. to justify the relief asked in plaintiff's complaint. Section 2281 and 2284 of Title 28 U.S.C. require that a substantial Constitutional question be raised to justify the convocation of a three judge court. It is first of all a function of the District Judge to whom an application is made to determine whether or not a "substantial" Constitutional question has been raised. *Idlewild Bon Voyage Liquor Corp.* v. *Epstein,* 370 U.S. 713, 82 S. Ct. 1294 (1962); *Swift & Company* v. *Wickham,* 382 U.S. 111, 86 S. Ct. 258 (1965). The fact that a three judge court has been convened, however, does not eliminate the necessity for a "substantial" Constitutional question to confer jurisdiction and the three judge District Court should dismiss the action where a three judge court was not required. *Swift and Company* v. *Wickham,* supra. The

Federal Constitution does not guarantee and protect rights and privileges of State citizenship. *Snowden* v. *Hughes,* 321 U.S. 1; 64 S. Ct. 397 (1944). In view of the comments of the United States Supreme Court in *United States* v. *Arizona,* supra, there can be no question that participation in a political party primary is an incident of State citizenship. Plaintiff's complaint should be referred back to a single judge for lack of a substantial constitutional question.

Conclusion

In light of *United States* v. *Arizona,* supra, *Williams* v. *Rhodes,* supra, and *Lippitt* v. *Cipollone,* supra, plaintiff has not established a claim upon which relief may be granted in the district court of the United States. Indeed, plaintiff has not established that this is properly a case before the United States District Court, that court being the court of limited jurisdiction. Clearly there is no sufficient showing to warrant summary judgment on behalf of plaintiff. The right to vote in a primary election is an incident of State citizenship and the Federal Constitution does not guarantee and protect rights and privileges of state citizenship. *Snowden* v. *Hughes,* supra. Plaintiff's complaint raises no substantial constitutional question so that a three judge court was not required. The three judge court should refer this matter to a single district judge. *Swift & Company* v. *Wickham,* supra.

Accordingly, defendants urge this court to deny plaintiff's motion for summary judgment in favor of plaintiff and refer this court to a single district court.

Defendants further urge that this cause be dismissed for want of jurisdiction or in the alternative that this

cause be dismissed for failure to state a claim upon which relief may be granted.

Respectfully submitted,

Stanley T. Kusper, Francis P. Canary and Marie Suthers as the Chicago Board of Election Commissioners

By /s/ Aldus S. Mitchell
/s/ Sophia H. Hall
/s/ Howard M. Miller

EXHIBIT "A"

SUPREME COURT OF THE UNITED STATES

Thomas W. Lippitt v. *Joseph A. Cipollone, et al.*

On Appeal from the United States District Court for the Northern District of Ohio

No. 71 5729. Decided January 17, 1972

The judgment is affirmed.

MR. JUSTICE DOUGLAS, dissenting.

In the 1970 Ohio primary election, appellant voted as a Republican and was a candidate for the Republican nomination to the House of Representatives from the 22d Congressional District of Ohio. Political allegiances change and, in the upcoming election, appellant seeks the nomination to Congress of the American Independence Party. He is prevented from pursuing this nomination, however, by an intricate statutory scheme. Central to this scheme is a statute which provides, with

various exceptions not relevant here, *e. g.*, Ohio Rev. Code § 3517.013 *et seq.* (Page Supp. 1970), that "[n]o person shall be a candidate for nomination or election at a party primary if he voted as a member of a different political party at any primary election within the next preceding four calendar years." Ohio Rev. Code § 3513.191 (Page 1960). Other provisions also being attacked require those working for primary candidates or signing their nominating petitions to be members of the party in which nomination is sought, *id.*, § 3513.05.

No one disputes that Ohio's statutory scheme prevents appellant from seeking the nomination of the party of his choice before 1974. Appellees, however, defend this limitation of freedom, saying that it is necessary to ensure "the formation of recognizable, relatively stable political parties with their own leadership, goals and philosophies." They conclude, "The protection of these purposes is a legitimate State concern." The District Court adopted this rationale,

> "The compelling State interests [*sic*] the Ohio Legislature seeks to protect by its contested statutes is the integrity of all political parties and membership therein. These Ohio statutes seek to prevent 'raiding' of one party by members of another party and to preclude candidates from '. . . altering their political party affiliations for opportunistic reasons.' *State ex rel. Bible* v. *Board of Educations*, 22 O. S. 2d 57 (1970). Protection of party membership uniformly applied to all parties cannot be characterized as 'invidious discrimination' as defined in *Williams* [v. *Rhodes*, 293 U.S. 23 (1968)]." ..... F. Supp. ....., ... (ND Ohio 1971).

Not only does the denial of appellant's right to seek the nomination of the American Independence Party in

1972 seriously impair his right of political expression, but the "compelling state interest" advanced by the appellees and accepted by the court below seems alien to our political and constitutional heritage. The right to run for public office seems a fundamental one.

The Ohio laws deny appellant that liberty, insofar as the 1972 election is concerned.

While I doubt that any state interest can be so compelling as to justify an impairment of associational freedoms in the area of philosophy—political or otherwise*—the reasons advanced by the court below require an answer. The District Court and the appellees see a compelling state interest in the need to preserve the status quo and to preserve political stability. This interest, it is argued, is secured by creating impediments to changes in party allegiance. Our history is replete with instances in which politicians—having become disenchanted with their previous parties or perhaps only for the "opportunistic" reasons condemned by the court below—have changed from one party to another. This list includes Teddy Roosevelt, Strom Thurmond, Wayne Morse, John Lindsay, George Wallace, and a host of others. Though these breaks from past political ties

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* In *Williams* v. *Rhodes*, *supra*, at 39-40, I said,

"Cumbersome election machinery can effectively suffocate the right of association, the promotion of political ideas and programs of political action, and the right to vote. The totality of Ohio's requirements has those effects. It is unnecessary to decide whether Ohio has an interest, 'compelling' or not, in abridging those rights because 'the men who drafted our Bill of Rights did all the "balancing" that was to be done in this field.' Appellees would imply that 'no kind of speech is to be protected if the Government can assert an interest of sufficient weight to induce this Court to uphold its abridgement.' I reject that suggestion." (Citations omitted.)

add vitality to our political process, Ohio makes it very difficult.

I would note this appeal and put the case down for early argument.

MR. JUSTICE BRENNAN, MR. JUSTICE WHITE, and MR. JUSTICE POWELL:

We are three of the four who dissent from the affirmance of the judgment of the District Court in this case. In the circumstances present here, however, we do not insist that the case be set down for oral argument.

OPINION

(Filed March 9, 1972)

Before SWYGERT, *Chief Circuit Judge,* MAROVITZ and BAUER, *District Judges.*

SWYGERT, *Chief Judge.* This case consolidates two actions, each of which attacks the constitutionality of sections 7-43(a), (d), and 7-44 of Chapter 46, Ill. Rev. Stat. Sections 7-43(a) and 7-44 condition voting in any primary upon a public declaration of party affiliation. Section 7-44 prohibits voting in the primary of one party if the voter has voted in the primary of another party within the preceding twenty-three months.[1] Plaintiffs seek

[1] Sections 7-43 and 7-44 provide:

§ 7-43. No person shall be entitled to vote at a primary:

(a) Unless he declares his party affiliations as required by this Article;

(b) Who shall have signed the petition for nomination of a candidate of any party with which he does not affiliate, when such candidate is to be voted for at the primary;

(c) Who shall have signed the nominating papers of an independent candidate for any office for which office candidates for nomination are to be voted for at such primary; or

declaratory and injunctive relief under 28 U.S.C. §§ 1343, 2281 and 42 U.S.C. § 1983.

The parties bringing the action are qualified Chicago and Lake County voters (plaintiffs Pontikes and Lombardo, respectively) who had voted in one party's primary in February 1971 and who now seek to vote in a different party's primary in March 1972, and a Lake County voter (plaintiff Klaetsch) who, though eligible to vote in any primary, challenges the restrictions that will attend her voting in March. Defendants are those officials responsible for the conduct of primary and general elections in each area, the Commissioners of the Chicago Board of Elections and the Clerk of Lake County.

The complaint in *Pontikes* v. *Kusper* was filed in district court in September 1971 and that in *Klaetsch* v. *Stern* in October 1971. A request for a three-judge court was subsequently granted, and the two actions were consolidated. The plaintiffs principally charge that section 7-43(d), which outlines the so-called "twenty-three month" rule, is unconstitutional because it impinges upon the right to vote and the right of association. They claim further that sections 7-43(a) and 7-44, the sections requiring a declaration of party affiliation, should fall as violative of the right to privacy, the right to vote, the right of association, and the provisions of the Voting

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(d) If he shall have voted after January 1, 1939 at a primary held under this Article 7 of another political party within a period of twenty-three calendar months next preceding the calendar month in which such primary is held. . . .

• • •

§ 7-44. Any person desiring to vote at a primary shall state his name, residence and party affiliation to the primary judges. . . . No person who refuses to state his party affiliation shall be allowed to vote at a primary.

Rights Act of 1960, 42 U.S.C. § 1971. They seek summary judgment based on these contentions. The defendants move to dismiss the complaint on the ground that no "case or controversy" has been presented, that no substantial federal question has been raised to vest jurisdiction in this court, and that even if jurisdiction were sustained, the federal courts should abstain from exercising it. We find no merit to these contentions and accordingly, we deny the defendants' motion. We grant the plaintiffs' motion for summary judgment only where section 7-43(d) is concerned. We find no basis for overturning sections 7-43(a) or 7-44.

I

The issues raised in the defendants' motion to dismiss have been considered and rejected by this court and others. Numerous cases have held that constitutional attacks on primary regulations by those immediately affected, prior to the primary date, do meet the requirements of a "case or controversy." *See Williams* v. *Rhodes,* 393 U.S. 23 (1968); *Rosario* v. *Rockefeller,* No. 71-C-1573 —*Eisner* v. *Rockefeller,* No. 71-C-1621 (E.D. N.Y., filed Feb. 10, 1972); *Bendinger* v. *Ogilvie,* No. 71-C-2037 (N.D. Ill., filed Nov. 16, 1971); *Jackson* v. *Ogilvie,* 325 F. Supp. 864 (N.D. Ill. 1971).

Moreover, this action raises several significant federal questions, principally the impact of the challenged statutes on the plaintiffs' right to vote and right of association. In *Bendinger* v. *Ogilvie, supra,* which involved a statute barring candidates from running in a primary who had voted in another party's primary within the preceding twenty-four months, this court did not contest the

fact that primaries were subject to federal constitutional standards and considered only whether these standards were met. Similarly, jurisdiction was properly found in two recent federal cases which dealt with primary election procedures comparable to those at issue here, *Gordon* v. *Executive Comm. of the Democratic Party of the City of Charleston,* No. 71-852 (D.S.C., filed Sept. 22, 1971), and *Rosiaro* v. *Rockefeller, supra.*

Finally, we see no reason to abstain from exercising our jurisdiction. There are no unsettled questions of state law at issue here which would require state court interpretation. The statutes involved are unambiguous. The only point in question is their conformity to the federal Constitution, a question we are mandated to resolve.

II

The plaintiffs' attack against section 7-43(d) is grounded upon both the right of association and the right to vote. We agree that the "twenty-three month rule" substantially burdens plaintiffs' right to vote in derogation of Article I, § 2 of the Constitution. Those who have voted in the March 1971 primary of one party are now deprived of the right to vote in the March 1972 primary should they choose to switch parties at this time. Even voters eligible to vote in any primary this March are affected since they are forced to choose between their right to vote and their right to freely affiliate within the twenty-three month period following the election. The defendants counter that the right to vote protected by the Constitution does not include the right to vote in a primary. They characterize primaries as the purely internal procedures of private organizations. We find the

holding in *United States* v. *Classic,* 313 U.S. 299 (1941), dispositive:

> Where the state law has made the primary *an integral part of the procedure of choice,* or where in fact the primary effectively controls the choice, the right of the elector to have his ballot counted at the primary is likewise included in the right protected by Article I, § 2. 313 U.S. at 318. (Emphasis added.)

See Williams v. *Rhodes, supra*; *Moore* v. *Ogilvie,* 394 U.S. 814 (1968); *Gray* v. *Sanders,* 372 U.S. 367 (1962); *Smith* v. *Allwright,* 321 U.S. 649 (1944); *Gordon* v. *Exec. Comm., supra*; *Rosario* v. *Rockefeller, supra.* Since in Illinois, primaries are subject to extensive state regulation, Ill. Rev. Stat. ch. 46, they fall squarely within the test of *Classic.*

In addition, we agree that the contested statute represents a significant incursion on the plaintiffs' rights of free association. It has the effect of attaching penalties to affiliation and disaffiliation since voters may not change parties during the twenty-three month period without being disenfranchised in the party primary of their choice.

Where a deprivation of the right to association or the right to vote is at stake, the statute will only be upheld if the state proves that it serves a "compelling" state interest. In *Williams,* the Court considered a challenge to several Ohio election laws which were claimed to make it "virtually impossible" for a new political party to be placed on state ballots for the purpose of choosing electors pledged for particular presidential or vice-presidential candidates. The Court stated:

> In determining whether the State has power to place such unequal burdens on minority groups where

> rights of this kind are at stake, the decisions of this court have consistently held that 'only a compelling State interest in the regulation of a subject within the State's constitutional power to regulate can justify limiting First Amendment freedoms.' 393 U.S. at 31.

Kramer v. *Union Free School District,* 395 U.S. 621 (1969), used a "compelling state interest" standard where only a deprivation of the right to vote rather than of first amendment rights was charged. More recently this court in *Bendinger* v. *Ogilvie, supra,* applied the identical test. *See Rosario* v. *Rockefeller, supra.*

The interest which section 7-43(d) is claimed to protect is the state's interest in guarding against any distortions of the electoral process in general and in maintaining the integrity of the two-party system in particular. The statute serves these interests by preventing a practice known as "raiding." "Raiding" occurs when members of one party vote in the primary of another party for the sole purpose of bringing about the nomination of the weakest candidate. But the statute sweeps too broadly, impeding both deceptive conduct and constitutionally protected activities. If section 7-43(d) were not in effect, massive party switching could occur either because of the well-planned raiding on one party's primary by members of another party, or because of massive dissatisfaction with the prevailing policies of an existing party. The state's interest upon which this statute is grounded could be characterized as "compelling" only if the former alternative is more likely to occur than the latter, or if raiding constitutes a more important danger than the danger to constitutionally protected rights however often it occurs. There is no evidence to

indicate that raiding is more likely to take place than "honest" switches of affiliation. Forty-four states do not impose post-election restraints on changing affiliation. This would indicate that raiding is not a serious threat to the multi-party system.

Moreover we cannot say that the mere possibility of raiding is more important than the potential deprivation of first amendment and voting rights this statute effects. The state's interest in maintaining a multi-party system has been found to be "compelling" at the primary level only where constitutional claims were raised by *candidates* who were barred from running in one party's primary when they had voted in another party's primary within the previous two years, *Bendinger* v. *Ogilvie, supra,* or within the previous four years, *Lippitt* v. *Cipollone,* No. 71-5729 (U.S., filed Jan. 17, 1972), and by *candidates* who were required to sign oaths affirming their support for the presidential and vice-presidential candidates of the party to which they claimed allegiance, *Ray* v. *Blair,* 343 U.S. 214 (1952).

Where—as in the instant case—the state's interest is weighed against the constitutional claims of political party *members,* the outcome has been different. In *Williams* v. *Rhodes, supra,* burdens on the right to form a party capable of effectively competing with other parties could not be justified by the state's interest in promoting a multi-party system. In *Rosario* v. *Rockefeller, supra,* and *Gordon* v. *Exec. Comm., supra,* state laws which affected constitutional rights in the same fashion as the Illinois law also fell where the identical justifications were offered. Indeed, dicta in *Bendinger* v. *Oglivie, supra,* specifically distinguish between the associational and voting

rights of members of political parties and the rights of candidates:

> The state's interest in limiting candidates from switching parties, as detailed above, is greater than its interest in limiting voters from switching parties. The state's interest in preserving a vigorous and competitive two-party system is fostered by the requirement that candidates demonstrate a certain loyalty and attachment to the party in whose primary they are running; the same cannot be said of voters, however, who should be freer to demonstrate changes in political attitude by voting for popular candidates or against unpopular candidates in any party's primary election.

These cases cannot be distinguished by characterizing the state's interest in section 7-43(d) in terms of the protection of the electoral process rather than the preservation of the two-party system. The difference is semantic. Distortion of the electoral process would here be occasioned by a distortion of the procedures of candidate selection, namely, the selection procedures of a two-party system.

We find none of the justifications offered by the state to be sufficiently compelling to outweigh the costs to constitutionally protected rights. The rights to free association and to the vote are at least as important today as they were at the time the Constitution was written. The pace of political change has greatly accelerated. A wide variety of important political events are likely to take place ever during the two-year period in which voters must affiliate with a single party or be disenfranchised. Moreover, primaries held during this period are likely to reflect a broad range of important issues.

The Illinois statutes provide for elections in each of the even numbered years for various state and county offices. These elections coincide with the elections for President, Vice-President, and members of Congress. Other primary elections are provided for, including special elections to fill certain vacancies, township elections, and city and village elections. These are conducted in the so-called "off years," the period between the regular primary and general elections in the even numbered years. This scheduling, coupled with the twenty-three month rule of section 7-43(d), has the effect of precluding a voter from participating in a primary of one party in a township, city, or village election and another at the regular primary level. We find this result untenable. Whatever are the advantages of maintaining party stability for elections at any given level of government, they do not apply when national, state, and local contests are considered together. A vote ought not be required to hold himself bound to a single party on every level of government.

III

Plaintiffs claim that sections 7-43(a) and 7-44, which require a declaration of party affiliation prior to voting, burdens their rights to privacy, to freely associate, and to the vote, in addition to violating the Voting Rights Act of 1960, 42 U.S.C. § 1971. We do not agree. The voter's choice of candidates in a single party's primary is not disclosed. The only public declaration he is called upon to make is to choose which party primary to participate in. Any imposition this places on the voter is minimal. Moreover, whatever burden is suffered is outweighed by the state's "compelling" interest in preventing election

fraud. Membership in a political party may be distinguished from membership in any other organization because of the role of the state in regulating and enforcing party selection procedures. *Cf. NAACP* v. *Alabama*, 357 U.S. 449 (1958). Section 7-43(a) and 7-44 not only serve to enforce the twenty-three month rule, as the plaintiffs claim, but also to buttress the requirement that voters participate in only one part's primary at a time.

The motion of defendants to dismiss the complaint is denied, and the motion of plaintiffs for summary judgment is granted insofar as section 7-43(d) is concerned. Section 7-43(d) of the Illinois Revised Statutes, Chapter 46, is hereby declared to be violative of the Constitution of the United States and is null and void. Defendants, their officers, agents, servants, employees, and attorneys, and those persons who act in active concert or participation with them are permanently enjoined, without bond, from executing or enforcing section 7-43(d) of the Illinois Revised Statutes, Chapter 46.

Enter: /s/ Luther M. Swygert
United States Circuit Judge
/s/ William J. Bauer
United States District Judge

Dated: March 7, 1972

DISSENTING OPINION

MAROVITZ, *District Judge*. I dissent not because I disagree with the majority's characterization of the right to vote and freely associate or with the "compelling state interest" test that ought to be employed in determining whether or not an unconstitutional infringement of those

rights has taken place but rather because having applied that test to the present situation, unlike the majority I have found no such infringement.

[I might note here that I fully concur in the jurisdictional findings of the majority; that a "case or controversy" does exist; that a substantial federal question has been raised; and that abstention would be improper in this case. The law is clear on these points and has been adequately documented by the majority. See Majority Opinion, *supra*, pp. 4-7.]

The crux of the majority opinion is based on the wholly valid proposition that any state infringement of the right to vote must be grounded in a "compelling interest" whose objective fully justifies tampering with rights so fundamental and hallowed as the right to vote and freedom of association. Indisputably the right to vote lies at the very heart of the democratic process and is a fundamental element in the principles by which this Nation is governed. Although the manifestation of this right has gone through vast political, social, demographic and geographic transformations over the years assuming the various shapes and forms suitable to the practicalities and exigencies of a particular era, its essential core stripped of historical and periodical gloss—the right of all citizens to choose freely without governmental interference—has always remained the same. It is the purity of this core that is protected from unwarranted and unjustified state intervention. Yet one need only look at the election code of any state in the Union today to realize that some sort of regulatory election procedure is not only justified and warranted but is moreover essential to preserve voting purity and

to prevent electoral anarchy. What must be pinpointed, then, is that fine line between the permissible and the impermissible.

It is because I concur in the majority's general view of the "compelling interest" test and because I do not wish my dissent to be misconstrued in any way as adulterating or altering that test or as permitting alleged violations of voting rights to be scrutinized with any less care than they are now being tested, that I find it necessary to briefly trace the development of the law in voting rights cases.

There are basically two criteria by which the constitutionality of an election statute can be judged, one objective and the other subjective. The objective test is simply the comparison of the questional regulation with constitutional dictate and previous pronouncements of the Supreme Court. If the Supreme Court has specifically prohibited a certain practice there is no doubt that the state regulation which directly conflicts with that prohibition must fall. But the law has never been so precedentially precise as to cover all situations in all times and quite often a specific procedure upon which the Constitution and the Courts have not yet spoken is attacked. Thus, parallel with the development of specific prohibited categories of conduct and growing out of Supreme Court usage, there has evolved a subjective test that is used for those instance that do not fit into any preconceived constitutional slots. This subjective test, as used in election cases has matured from the "rational basis" to the "compelling state interest" test.

In the earlier years of our country the Congress and the Courts were concerned with the formative problem of

expanding a basically limited suffrage to that of universal suffrage. The most blatant and obviously unconstitutional disenfranchisement was the quantitative exclusion of larger segments of the population such as black people and women. Both of these exclusions were cured by constitutional amendments, the latter occurring within our time, and quite understandably a state cannot now claim that it has a "compelling interest" to exclude those groups. Disenfranchisements of this sort are easily discernible and fit into clear-cut constitutional categories.

In recent years cases dealing more with the qualitative rather than quantitative aspects of the vote have reached the Supreme Court. In these instances there was no outright denial of the right to vote but rather the question raised was whether the right of suffrage is denied by dilution or debasement of a vote cast by malapportionment. In *Reynolds* v. *Sims*, 377 U.S. 533 (1964) the apportionment of the Alabama Legislature's two houses was challenged on equal protection grounds.

See also *Baker* v. *Carr*, 369 U.S. 186; *Gray* v. *Sanders*, 372 U.S. 368; *Wesberry* v. *Sanders*, 376 U.S. 1; *U. S.* v. *Mosely*, 238 U.S. 383; *United States* v. *Classic*, 313 U.S. 299; *Ex parte Siebold*, 100 U.S. 371; *U. S.* v. *Saylor*, 322 U.S. 385; *Gomillion* v. *Lightfoot*, 364 U.S. 339; *Nixon* v. *Herndon*, 273 U.S. 536; *Nixon* v. *Condon*, 286 U.S. 73; *Smith* v. *Allwright*, 321 U.S. 649; *Terry* v. *Adams*, 345 U.S. 461.

In the last decade the courts have also been faced with the narrower more limited exclusions of smaller segments of the population. Often these lesser restrictions are of a very localized and regional nature unlike the

nationwide exclusions of a century ago. At times these exclusions such as poll taxes or literacy tests come cloaked in the guise of a general regulation but in reality and racially motivated having a more pronounced affect on minority groups; other times the state is simply convinced that a certain regulation is desirable and permissible. See for example: *Carrington* v. *Rash,* 380 U.S. 89 (1965): State may not deny the opportunity to vote a bona fide resident because he is a member of the armed forces. *Harper* v. *Virginia Board of Election Commissioners,* 383 U.S. 663 (1966): State may not impose a poll tax; *Kramer* v. *Union Free School District,* 395 U.S. 629 (1969): State may not require citizens to own or lease taxable realty in order to vote in a local election. See also *City of Phoenix* v. *Kalodziejski,* 399 U.S. 204 (1970); *Evans* v. *Cornman,* 398 U.S. 419 (1970): State cannot refuse to permit persons living in a federal enclave to vote; *Affeldt* v. *Whitcomb,* 319 F. Supp. 69 (Three Judge Court, N.D. Ind. 1970): State may not impose a one year residency requirement. See also *Hadnott* v. *Amos,* 320 F. Supp. 107 (Three Judge Court, M.D. Ala. 1970), *aff'd.* 401 U.S. 968 (1971) (one year residency requirement struck down) and *Keppel* v. *Donovan,* 326 F. Supp. 15 (Three Judge Court, D. Minn. 1970) (6 month requirement struck down).

Thus these specific practices have explicitly been outlawed by the Supreme Court and some lower Federal Courts. Yet as indicated earlier an implicit criteria has developed out of these cases to be used in those areas yet uncharted by the Supreme Court.

The District Court in New York in *Rosario, et al.* v. *Rockefeller, et al,* 71 C 1573 (Slip Op. February 10, 1972)

spent a great deal of time in tracing the development of the subjective "compelling interest" test. In *Reynolds* v. *Sims, supra* the Supreme Court said that "any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized." 377 U.S. at 561-62. A year later in *Carrington* v. *Rash*, 380 U.S. at 96 the Court stated that "States may not casually deprive a class of individuals of the vote because of some remote administrative benefit to the State" and in 1966 in *Harper* v. *Virginia State Board of Elections*, 383 U.S. 663 at 670 the Court indicated that "where fundamental rights and liberties are asserted under the Equal Protection Clause, classifications which might invade or restrain them must be closely scrutinized and confined."

The Court in *Rosario* went on to say:

> "At the October Term of 1968, the Supreme Court continued to enlarge the divergence between the treatment to be accorded most state statutes when attacked as violating the Equal Protection Clause and the treatment to be accorded those statutes specifically affecting the right to vote. In *Williams* v. *Rhodes*, 393 U.S. 23, 89 S. Ct. 5 (1968), the Court was presented with a challenge to a set of Ohio statutes which made it extremely difficult for any party other than the Democratic or Republican Party to achieve the status of an established party and to have its name and its candidates placed on the ballot in the general election . . . The test applied by the Court, however, was not whether any merely rational basis could be imagined to justify the enactment of the statutes, but whether or not there was any *compelling* state interest to justify their existence . . .
>
> The Court drew support for the use of this test from a case which had not involved the right to vote,

but was solely concerned with First Amendment rights of association . . .

The Court concluded by saying that "The State has here failed to show any 'compelling interest' which justifies imposing such heavy burdens on the right to vote and to associate," and ". . . the totality of the Ohio restrictive laws taken as a whole imposes a burden on voting and associational rights which we hold is an invidious discrimination, in violation of the Equal Protection Clause," (393 U.S. at 31 and 34, 89 S. Ct. at 11 and 12).

The opinion in *Williams* v. *Rhodes, supra,* left one in some doubt as to whether the compelling state interest test would be applied to cases involving only voting rights and having no First Amendment overtones. Later in that same Term, however, the Court decided *Kramer* v. *Union Free School District,* 395 U.S. 621, 89 S. Ct. 1886 (1969), and did much in the *Kramer* opinion to clarify its view of the appropriate test to be used when statutes involving the right to vote are challenged on equal protection grounds.

In *Kramer,* the challenged statute restricted the vote in local school board elections to those otherwise qualified voters who were either parents of children attending schools within the local public school system or were owners or lessees of real property within the school district . . . The Court held that the compelling state interest test applied to the voting restrictions in issue, and, finding no such interest, voided the statute . . . The Court said:

> Appellant agrees that the States have the power to impose reasonable citizenship, age, and residency requirements on the availability of the ballot. Cf. *Carrington* v. *Rash,* 380 U.S. 89, 91, 85 S. Ct. 775, 777, 13 L. Ed. 2d 675 (1965); *Pope* v. *Williams,* 193 U.S. 621, 24 S. Ct. 573, 48 L.

> Ed. 817 (1904). Statutes granting the franchise to residents on a selective basis always pose the danger of denying some citizens any effective voice in the governmental affairs which substantially affect their lives. [Footnote omitted.] Therefore, if a challenged state statute grants the right to vote to some bona fide residents of requisite age and citizenship and denies the franchise to others, the Court must determine whether the exclusions are necessary to promote a compelling state interest. (395 U.S. at 625-27, 89 S. Ct. 1888-90). [Emphasis in original.]
>
> It is evident from the Court's opinion in *Kramer* that once a state has imposed basic voting requirements of citizenship, age, and residency, all further requirements (which by their nature must be viewed as restrictions) must of necessity be supported by a compelling state interest. This in effect places the burden of proof on the state, the reverse of the situation where the rational basis test is applied. The basic requirements of citizenship, age and residency, are to be tested, when they are challenged, by the traditional, "rational relation" test, used in garden-variety equal protection cases."

We therefore have before us a clearly defined subjective test to apply in our case given the absence of any specific Supreme Court pronouncement on the constitutionality of a 23-month rule. What must be determined is whether the State of Illinois has carried the burden in proving that it has not merely a rational basis for prohibiting voting in a primary of one party by a citizen who has voted within 23 months in the primary of another party but that it has a "compelling interest". What must also be kept in mind is that voting rights are not absolute and that there is a degree of constitutional in-

fringement short of invidiousness that is permissible as long as the infringement is compelled by a state interest and affects the rights of the voters as little as practicable under the circumstances. This in fact was part of the rationale of *Bendinger, supra,* at p. 4:

> "Before a state can place any restrictions upon the freedom to associate freely and to vote, it must be shown that a compelling state interest justifies such regulation. *Williams* v. *Rhodes,* 393 U.S. 23 (1968); *NAACP* v. *Button,* 371 U.S. 415 (1963); *Jackson* v. *Ogilvie, supra. Further it must be shown that the state statute in question is not only as fair as possible but also that it infringes upon the First Amendment rights of those affected as little as practicable under the circumstances. Williams* v. *Rhodes, supra* at 32, 33; *Briscoe* v. *Kusper,* 435 F. 2d 1046 (7th Cir. 1970); *Jackson* v. *Ogilvie, supra.*" [Emphasis added]

The compelling interest asserted by the State is the prevention of inter-party "raiding" that would result from open primaries. Raiding occurs where members of one party vote in the primary of the opposition party in the hopes of electing a weak candidate or a "straw man" who could easily be defeated by the candidate of their true party in the general election. This might happen where the candidate of their true party is running unopposed in the primary and their votes are not needed; where a certain candidate in their party is far stronger than all challengers making their votes unnecessary and better utilized in the primary of the other party; or where members of one party in a certain district far outnumber the members of the opposition party and a great portion of the votes are expendable and can be allocated to set up a "straw man".

That such "raiding" can occur has been recognized by several Courts. In *Bendinger* v. *Ogilvie,* 71 C 2037 (N.D. Ill.) a Three Judge Court dealt with the Illinois statutory requirement that in order to be an eligible candidate in a political party primary a person cannot have "requested a primary ballot of any other party at a primary election held within two years of the date on which the petition must be filed." Ill. Rev. Stat. Ch. 46 Section 8-8. The Court found the statute constitutional and said:

> "In addition to the policy of limiting the elective process to manageable and realistic proportions, there are even more serious and compelling reasons underlying this legislation. The most important of these is the prevention of the subversion of the entire elective process. The keystone of our democracy is the party system of politics. Before any general election, each party must go through its manpower resources in order to find a candidate who not only represents a consensus of the opinions of the members of his own party, but will be appealing to a majority of the entire voting population as well. If there were no "24 month rule", then this system could be thrown into total chaos. For instance, suppose Party A had a strong candidate for a certain post and it was clear that he would receive his party's nomination with votes to spare. Without the deterrent effect of the "24 month rule" it would be a relatively simple matter for Party A to have one or more of its party regulars run in Party B's primary in the hope that one would win the Party B primary and then put up little or no opposition to the Party A candidate in the ensuing general election. The resulting confusion and subversion of the elective process is obvious, and, without the "24 month rule", could not be controlled.

There is another obvious reason which is clearly compelling and which underlies this legislation. It, too, is grounded in the protection of the elective process. That is the question of protecting the party system as we know it. Without rules like the "24 month rule", party swapping and changing might conceivably become so prevalent that the average political party could no longer function properly. With the resulting disruption of party unity and discipline, a political party would be unable to decide who to support because the person whom they did or did not support today could be on the other side of the aisle tomorrow. Thus, it is obvious that the "24 month rule" protects the elective process from subversion from many sides and thereby serves to promote the most compelling of state interests."

The Court stopped short of applying this same compelling interest to voter rather than candidate cases and in fact indicated that the case might be different in the voter situation. *Bendinger,* however, was a candidate case and the Court had no real opportunity to adequately consider the "raiding" implications in voter cases. This Court on the other hand has had ample opportunity to consider all the evidence and to hear oral argument on this precise issue and I find that the State's prevention of "raiding" is as compelling an interest in voter cases as it is in candidate cases and that the State has met all of the requirements of the "compelling interest" test as set out above. (See also *Gunderson* v. *Ghent, et al.,* 69 C 43 (W.D. Ill. Slip. Op. February 2, 1970) which also upheld the statute regarding candidates on the grounds that "it reflects a State policy to foster and lend stability to party structure and political organization".)

In *Lippitt* v. *Cipollone*, C 71-667 (N.D. Ohio Slip Opinion, November 5, 1971) the Court also considered a statute regulating candidacy based on party affiliation. The Court said:

> "The compelling State interests the Ohio Legislature seeks to protect by its contested statutes is the integrity of all political parties and membership therein. These Ohio statutes seek to prevent "raiding" of one party by members of another party and to preclude candidates from" . . . altering their political party affiliations for opportunistic reasons." *State ex rel Bible* v. *Board of Elections*, 22 O.S. 2d 57 (1970). Protection of party membership uniformly applied to all parties cannot be characterized as "invidious discrimination" as defined in *Williams*. The United States Supreme Court has recognized the need to "protect a party from intrusion by those with adverse political principles" to be a legitimate purpose for said legislature. *Ray* v. *Blair*, 343 U.S. 214 (1952).
>
> The requirement of the challenged statutes insuring party integrity and party political affiliation, together with the exemptions enacted to aid emerging political parties, are simple, reasonable, and uniform procedures designed to accomplish the desired result."

The U. S. Supreme Court in *Lippitt* v. *Cipollone*, 71-5729 (Slip. Op. January 7, 1972) in affirming the lower Court decision without opinion implicitly conceded the possibility of raiding and recognized its prevention as being a valid State interest. Preventing raiding is a valid compelling interest of the State and is as applicable, I believe, in voter cases as it is in candidate cases.

Juxtaposing this compelling interest of the State against the temporary deprivation of the plaintiffs' right

to vote in this particular primary and considering the fact plaintiffs are not deprived of their right to vote since they are perfectly free to vote in the primary of the party for which they voted in the February 1971 primary, I find no basis for overturning these statutes.

While the majority finds that "[t]here is no evidence to indicate that raiding is more likely to take place than "honest" switches of affiliation" and "that raiding is not a serious threat to the multi-party system" (Majority Opinion, p. 8) I am compelled by the evidence and Illinois political circumstance to believe that such a threat is a very real and imminent one absent the statute in question and not merely one in the realm of the hypothetical or speculative. Thus my application of the compelling interest test to the present situation produces a different result than that of the majority based on the single, critical factor of the substantiality and probability of inter-party raiding.

We might note here that the result in *Rosario, supra* was the invalidation of a procedure that was also designed to prevent raiding. In that case however the "enrollment box" procedure failed to meet the "compelling interest" test because it was not the least drastic measure available to accomplish the objective sought and it was not proven that the system was necessary for its accomplishment. The Court did not however discount the possibility of raiding but determined that there was a less invidious method of preventing it. I, however, believe that the sweep of the 23-month rule is narrow enough to conform with the least invidious and compelling interest test.

Furthermore I do not believe that the contrary decision of *Gordon* v. *Executive Committee of the Democratic Party of Charleston*, 71 C 852 (D.S.C. Slip. Op. September 28, 1971) forecloses my opposite finding. The statute in that case also prevented a citizen from voting in the primary of another party and the Court invalidated it on the grounds that it was arbitrary and was not justified by a compelling State interest. What must be understood is that the "compelling interest" test is of an acutely subjective nature and given the fact that political climates are as variable as geographic climates a State interest that might be less than compelling to a Judicial panel in one locale may take on compelling proportions to a panel in a different district.

I need not elaborate on the constitutionality of the Section 7-43(a) and Section 7-44 regarding the declaration of party affiliation since defendants themselves admit that it is the means by which the 23-month restriction is enforced. Having found that the 23-month rule is constitutional we likewise find that the same compelling State interest of "raiding" justifies the declaration of party affiliation and that it does not violate the First and Fourteenth Amendments, or the Voting Rights Act. In addition the majority, which has found the twenty-three month rule unconstitutional has nevertheless upheld the declaration of party affiliation portion of the statute on the grounds that the infringement on the voter is minimal and that "whatever burden is suffered is outweighed by the state's 'compelling' interest in preventing election fraud", and that furthermore it is also necessary "to buttress the requirement that voters participate in only one party's primary at a time". (See Majority Opin-

ion at pp. 11-12.) Thus even if we were not to consider raiding a threat we would nevertheless be bound to find the declaration portion of the statute constitutional based on the majority's reasons.

To summarize, then, in applying the current compelling interest test as designated for voting rights cases I have found that both the 23-month rule and the declaration of party affiliation is fully justified by the interest of the State in preventing the inter-party raiding that would result absent these restrictions; that the infringement of the plaintiffs' rights is minimal given its temporary nature and the existence of alternate electoral avenues; and that these are the least drastic measures available.

In finding so I need not base my decision solely on the grounds that the preservation of party integrity and the multi-party system is a proper state interest as *Bendinger, Gunderson* and *Lippitt* v. *Cipollone* do indeed indicate. The argument that this Court ought not be instrumental in preserving those artificial procedures and extra-constitutional encumberances, such as party politics, that have been engrafted wisely or unwisely by historical development upon the purity of the American electoral process might be a more valid one were we being asked to take the initiative in instituting such procedures where they did not before exist. Thus if political parties as such and their accompanying procedures were nonexistent it might be validly posited that it is beyond the province of this Court to lend assistance in their creation. This, however, is not a case where we are being asked by the State for a declaratory judgment or injunctive relief that would create or put into effect party system rules such as the 23-month or

party affiliation regulations. Rather our task has been to analyse and weigh, with the prescribed constitutional criteria, an already existing law that the legislature in its considered judgment has determined to be the best method available for the preservation of that electoral purity that both sides in this case so earnestly desire. It is far beyond the role intended for this Court to adopt the posture of a microcosmic legislature that would design better methods of preserving electoral purity where an adequate statute that meets the compelling interest test has already been promulgated by the state legislature. In attempting to preserve that purity as embodied and manifested in the statutes under attack it would be remiss of this Court not to take judicial notice of the inescapable fact that parties and party lines do indeed exist and that they are inseparable elements of the electoral scene. We would be equally remiss if we were not cognizant of the fact that party allegiances are powerful and can quite easily lead to nefarious inter-party raiding absent any restrictions. [See Dreiske, *GOP Primary Ploy*, Chicago Sun-Times, March 1, 1972, p. 40 which indicates that Republicans are being urged on a large scale to cross over into the Democratic Party on March 21, 1972 since there are no real contests in the Republican Primary. The article indicates that an even greater crossover would take place were it not for the twenty-three month rule.] The adoption of such a position when reality so compels and the circumstances so dictate does not mean that I take a more jaundiced or more untrusting view of the voting public than does the majority but rather indicates that I believe the phenomenum of raiding to be an inescapable outgrowth of the competitiveness engendered by the multi-party system

and that that competitiveness ought not go so far as to inject any impurities or fraud into the electoral process as it manifests itself on general election day. My determination, then, that the statute is not unconstitutional is as much motivated by my desire to preserve the multi-party system as it is to prevent the shambles that could conceivably result in the general elections, irrespective of party considerations, absent any phophylactic measure to prevent raiding.

I would therefore find Sections 7-43 and 7-44 constitutional and dismiss the Plaintiff's case. Being in the minority I must be contented with a vigorous dissent.

Enter: /s/ Abraham Lincoln Marovitz
Judge

Dated: March 7, 1972

ORDER OF MARCH 9, 1972

(Received March 10, 1972)

The Three Judge Court Having Taken These Two Cases Under Advisement Has Decided By A Vote Of Two To One That Section 7-43(d) Of The Illinois Election Law Which Prohibits Voting In A Party Primary By One Who Has Voted In The Primary Of Another Party Within Twenty Three Months Is Unconstitutional. Chief Judge Swygert And District Judge Bauer For The Majority Have Found That The Twenty-Three Month Rule Infringes On The Right To Vote And The Right To Freely Associate And That The State Has Failed To Prove That It Has A Compelling Interest In Maintaining This Statute.

Judge Marovitz Dissents From The Holding That The Twenty Three Month Rule Is Unconstitutional And Would Uphold The Statute On The Grounds That The State Does Have A Compelling Interest In Preventing Inter-Party Raiding And The Crossing Of Party Lines That Would Result In The Absence Of Such A Rule.

All Three Judges Concur In The Finding That The Declaration Of Party Affiliation As It Appears In §7-43 (a) And §7-44 *Is Constitutional* Because Its Affect On Voters Is Minimal And It Is Justified By The State's Compelling Interest To Prevent Voter Fraud. Judge Marovitz Holds In Addition That It Is Necessary To Effectuate The Twenty Three Month Rule Which He Would Uphold.

Holding: ***The Twenty-Three Month Rule, § 7-43(d) Is Ruled Unconstitutional And The Declaration Of Party Affiliation Rule § 7-43(a) And § 7-44 Are Held Unconstitutional.*** **(Draft)**